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By overnight mail and e-filing

September 8, 2004

Mary Cottrell, Secretary
Department of Telecommunications and Energy
Commonwealth of Massachusetts
One South Station, 2nd Floor
Boston, MA 02110

Re: D.T.E. 04-33 – Verizon Petition for Arbitration

Dear Ms. Cottrell:

MCI submits this letter in lieu of formal reply comments in response to the Department's August 23, 2004 notice requesting comments on the effect of the FCC's *Interim Rules Order* on this proceeding. MCI respectfully submits that the Department should hold in abeyance those arbitration issues that are addressed in the *Interim Rules Order*, but proceed with litigation on the issues relating to those aspects of the *Triennial Review Order* ("*TRO*") that were affirmed or not affected by the Court's decision in *USTA II*.

In its comments, Verizon Massachusetts ("Verizon") urges the Department to "quickly conclude this arbitration to assure prompt implementation of the FCC's final unbundling rules." Verizon Comments, p.1. Verizon indicates that it plans to modify its proposed contract amendment "to reflect the interim rules" and that its revised contract amendment will be filed no later than September 14, 2004. Verizon Comments, pp. 4-5.

Verizon conveniently fails to point out to the Department that the very same interim rules that Verizon proposes as the basis for litigation have been challenged by Verizon and other ILECs by the filing of a petition for a writ of mandamus with the D.C. Circuit. If Verizon is successful in that application, the FCC's interim unbundling rules will be vacated. Given Verizon's application to the D.C. Circuit, the Department should question the sincerity of Verizon's request that the Department quickly press forward with the arbitration issues affected by the *Interim Rules Order*.

Conducting a change of law proceeding on the requirements imposed in the *Interim Rules Order* would be a huge waste of time by the Department. The FCC supports that point. In the *Interim Rules Order*, the FCC stated:

> Moreover, whether competitors and incumbents would seek resolution of disputes arising from the operation of their change of law clauses here, in federal court, in state court, or at state public utility commissions, and what standards might be used to resolve such disputes, is a matter of speculation. *What is certain, however, is that such litigation would be wasteful in light of the Commission's plan to adopt new permanent rules as soon as possible.*

Interim Rules Order, ¶ 17 (emphasis added).

Clearly, the Department should wait for the release of permanent FCC rules to address mass market switching, high capacity loops and dedicated transport. The Department should not assume that Verizon will not have any unbundling obligations with respect to these elements. As the *Interim Rules Order* makes clear, the FCC will be looking at evidence on which network elements, in which markets, will be the subject of unbundling obligations. *See Interim Rules Order*, ¶ 11. The FCC rulemaking should run its course. Once new rules are put into effect, then it would be appropriate for the Department to arbitrate changes of law to Verizon's

interconnection agreements. Although the FCC did not restrict state commissions from presuming the absence of unbundling obligations, *see Interim Rules Order*, ¶22, the FCC also did not mandate such an approach by the state commissions if the ILEC chooses to press ahead with change of law proceedings prior to release of permanent unbundling rules. Prudence clearly dictates waiting for the FCC to adopt final rules. To do otherwise, as the FCC noted, is a waste of time for all concerned.

Finally, Verizon correctly noted that the *Interim Rules Order* does not affect any of the *TRO* rules that were affirmed by the D.C. Circuit in *USTA II* or were not challenged on appeal. Verizon Comments, pp. 2-3. Verizon's comments cite a number of new rules, including elimination of unbundling requirements for enterprise switching, OCn loops and transport, etc. Verizon neglects to point out new rules relating to EELs and commingling, which are of benefit to CLECs. These rules are also not the subject of the *Interim Rules Order*. The Department can and should press ahead with arbitration of these disputed issues, and then, later, after the FCC adopts final rules, arbitrate unresolved issues relating to mass market switching, high capacity loops and dedicated transport.

In summary, pressing ahead with this arbitration on issues that have been remanded by the *USTA II* court to the FCC is a waste of time until the FCC adopts final unbundling rules. *TRO* rules that have gone into effect should be implemented.

Respectfully submitted,

Richard C. Fipphen

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